

**Written Testimony of Special Counsel Carolyn N. Lerner
United States Office of Special Counsel**

Senate Committee on Veterans' Affairs

Hearing on Pending Health Care and Benefits Legislation

June 24, 2015

Chairman Isakson, Ranking Member Blumenthal, and Members of the Committee:

Thank you for the opportunity to submit written testimony on behalf of the Office of Special Counsel (OSC). OSC protects the merit system for over 2 million civilian employees in the federal government. We do this with a staff of approximately 140 employees and among the smallest budgets of any federal law enforcement agency.

Congress has tasked OSC with four distinct mission areas. First, we investigate and prosecute alleged prohibited personnel practices, such as retaliation for whistleblowing. Second, we provide a safe and secure channel for employees to disclose waste, fraud, abuse, and threats to public health or safety. Third, we enforce the Hatch Act, which keeps the federal workplace free from political coercion and improper partisan politics. Finally, OSC plays a critical role in enforcing the Uniformed Services Employment and Reemployment Rights Act (USERRA), helping to ensure that service members and veterans are free from discrimination and are reemployed into their proper positions when returning from active duty to the federal civil service.

We offer the following views on the potential impact of S. 1082 and S. 1117 on OSC's efforts to protect whistleblowers.

S. 1082 – Department of Veterans Affairs Accountability Act of 2015

The "Department of Veterans Affairs Accountability Act of 2015" provides the Secretary of Veterans Affairs with additional authority to remove or demote VA employees based on their performance or misconduct. The Act prohibits the Secretary from using the new expedited disciplinary action authority if an employee has a complaint pending with OSC, "without the approval of the Special Counsel." We understand the intent of this provision is to allow OSC to review a pending whistleblower complaint and ensure that any expedited removal or demotion is not retaliatory.

While well-intended, this provision is likely to result in a massive increase in the number of claims filed with OSC by VA employees. If all VA employees are subject to an expedited disciplinary process, we anticipate that a significant percentage of the VA workforce of over 300,000 employees will preemptively file claims with OSC to guard against the possibility of being fired or demoted. With our limited staff and resources, this will make it extraordinarily difficult for OSC to manage our caseload effectively, and to separate the meritorious whistleblower cases from those that are filed primarily to stall an anticipated or feared disciplinary action.

The percentage of OSC cases filed by VA employees is already overwhelming, and continues to climb. OSC has jurisdiction over the entire federal government. Yet, in 2015, nearly 40% of our incoming cases will be filed by VA employees. For the first time, the number of VA cases filed at OSC has surpassed the Department of Defense, which has over twice the number of employees as the VA. We expect this trend to continue into 2016.

This provision could add significantly to an already unsustainable caseload. Without significant additional resources for OSC and the ability to quickly process non-meritorious claims, this provision could negatively impact whistleblower protection efforts by tying up our limited resources on thousands of preemptive and otherwise non-meritorious complaints brought by VA workers. If Congress provides the Secretary with this additional authority, we recommend that Congress also provide OSC with the authority to quickly process complaints brought by VA employees, without the procedural and notice requirements of section 1214 of title 5.

S. 1117 – Ensuring Veteran Safety Through Accountability Act of 2015

The “Ensuring Veteran Safety Through Accountability Act of 2015” provides the Secretary with largely the same authority as S. 1082. However, the Secretary’s authority extends only to the VA’s healthcare workforce appointed under title 38 (and not to those employees appointed under title 5), and does not explicitly reference the authority of OSC to block an expedited removal or demotion. Because of this, the number of VA employees who file preemptive claims with OSC may be somewhat smaller. Nevertheless, we remain very concerned about the impact this Act would have on our caseload, as summarized above.

In conclusion, the VA workforce accounts for a significant percentage of all cases pending at OSC. OSC has acted to protect dozens of these workers from retaliation for blowing the whistle on threats to patient health and safety. In many of these cases, we secured relief for the whistleblower on an expedited basis, utilizing a program we established in partnership with the VA to promote timely relief for victims of retaliation.

As the Committee considers these pending bills, we encourage you also to consider the impact on OSC, and to provide us with the resources and tools needed to continue to seek timely and significant relief for VA whistleblowers.